Supreme Court, U.S.
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No. _____

**In the**

# Supreme Court of the United States

CLAUDE LAMBERT and MICHELINE LAMBERT,
*Petitioners,*

v.

CITY AND COUNTY OF SAN FRANCISCO, a California Municipal Corporation, on Behalf of the SAN FRANCISCO DEPARTMENT OF CITY PLANNING; SAN FRANCISCO CITY ZONING ADMINISTRATOR; and BOARD OF PERMIT APPEALS,
*Respondents.*

**On Petition for Writ of Certiorari to the California Court of Appeal for the First Appellate District**

## PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

In *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), this Court ruled that an exaction imposed as a condition to the granting of a discretionary land use permit is subject to heightened judicial scrutiny to determine whether the exaction substantially advances a legitimate state interest. *Id.* at 834 n.3. This case presents the question of whether *Nollan's* heightened scrutiny is also triggered when a development permit is *denied*, following the landowners' refusal to comply with a demand for a cash payment of $600,000 in exchange for the permit.

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Petitioners Claude and Micheline Lambert respectfully pray that a writ of certiorari issue to review the judgment and opinion of the California Court of Appeal, First Appellate District, entered in the above-entitled proceeding on September 23, 1997.

## OPINIONS BELOW

The decision of the California Court of Appeal, formerly reported at 57 Cal. App. 4th 1172 (1997), is reproduced as Appendix (App.) A to this petition. The Judgment for the City and County of San Francisco (City) entered by the San Francisco Superior Court is unreported and is reproduced as Appendix D.

## JURISDICTION

The opinion of the California Court of Appeal that is the subject of this petition was filed and entered on September 23, 1997. App. A. The court of appeal considered and decided the question of whether the City's denial of a conditional use permit constituted an uncompensated regulatory taking of the Lamberts' property in violation of the Fifth and Fourteenth Amendments to the United States Constitution. The California Supreme Court granted the Lamberts' petition for review on January 14, 1998 (App. C) but dismissed its order granting review on July 28, 1999 (App. B). This petition for writ of certiorari has been timely filed and the jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

## CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

The Fifth Amendment to the United States Constitution provides in pertinent part: "private property [shall not] be taken for public use, without just compensation."

Pertinent portions of the San Francisco Residential Hotel Unit Conversion and Demolition Ordinance (Hotel Conversion

Ordinance or HCO), San Francisco Administrative Code Chapter 41, are reproduced at Appendix G.

## STATEMENT OF THE CASE

Appellants Claude and Micheline Lambert (Lamberts) challenge the constitutionality of a denial by the City and County of San Francisco of a permit to offer vacant rooms to rent in their property, the Cornell Hotel. The City's denial followed the Lamberts' refusal to comply with a demand for a cash payment of $600,000 in exchange for the permit.

This Court has long required heightened judicial scrutiny of individualized exactions demanded as conditions to the issuance of discretionary land use permits. Under *Nollan v. California Coastal Commission*, 483 U.S. 825, such exactions must bear an essential nexus to the achievement of a legitimate regulatory objective. *Id.* at 837. This requirement of heightened judicial scrutiny applies not just to exactions of real property but also to demands for monetary payments in exchange for discretionary development permits.[1]

In the proceedings below, neither the City nor the courts asserted that the City's proposed $600,000 exaction would have been found constitutional under *Nollan*. Instead, the court of appeal held that *Nollan's* heightened scrutiny is not applicable when a permit is *denied* for nonpayment of the suspect fee. App. A-10-12. As Presiding Justice Strankman observed in dissent, this holding presents this Court

> with a critical legal question: is heightened scrutiny triggered when a government entity denies a permit when a condition is not met, rather than granting the permit with a condition?

App. A-19-20 (Strankman, P.J., dissenting).

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[1] *See, e.g., Ehrlich v. City of Culver City*, 12 Cal. 4th 854, 859-63 (1996).



### A. The Cornell Hotel and the Hotel Conversion Ordinance

In 1978 Claude and Micheline Lambert purchased the Cornell Hotel, a 58-room Victorian hotel in the City of San Francisco.[2] Three years later, the City adopted the Residential Hotel Unit Conversion and Demolition Ordinance. Under the HCO, 31 of the Cornell's 58 rooms were classified as "residential"--*i.e.*, rooms which had been rented to the same guest for more than 32 days, based on a survey of room usage as of September 23, 1979.[3] Most of the so-called "residential" guests at the Cornell Hotel at that time were in fact foreign exchange students and visiting businessmen.[4]

The City applies the HCO to maintain the same distribution of "residential" and "tourist" rooms that existed at the time of their initial designation in 1979.[5] If a room had been rented to the same guest for more than 32 days 20 years ago, it cannot be rented to an overnight visitor today without obtaining a "conversion" permit from the City.[6] As a condition to issuing these permits, the City demands cash payments equal to 40% of the appraised replacement value of the rooms.[7] Although the supposed rationale for the HCO is to force a small group of owners to maintain a stock of "affordable" housing for

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[2] Court of Appeal Appellants' Appendix (AA) at 253.

[3] *Id.*

[4] *Id.* at 257.

[5] *Id.* at 93.

[6] HCO § 41.12, App. G-2-3.

[7] Applicants are given the dubious option of actually building new rooms and giving them to the City instead of paying the fee. HCO § 41.12-41.13, App. G-3-6. Since the events recounted in this petition, the exaction has been doubled to 80% of the appraised value of the rooms in question. App. A-14.

the benefit of the City, a large proportion of the so-called "residential" rooms are in fact vacant. Data reported by the City show that in 1994 there were over 5,000 vacant "residential" rooms in the 528 small hotels that are subject to the HCO.[8] This corresponds to the situation at the Cornell, where all 31 of the rooms designated by the City as "residential" are vacant.[9] Thus, the actual effect of the City's enforcement of the HCO is to exact payments from the owners of these 528 properties in exchange for allowing them to rent out their vacant rooms. This scheme has been aptly described as "ransom" by the court of appeal.[10]

In 1993, a federal court ruled that the HCO effected an unconstitutional taking of property in violation of the Fifth and Fourteenth Amendments to the United States Constitution.[11] The City responded that it was not bound by decisions of the federal courts and would continue enforcing the HCO.[12] To help insulate the regulations and their controversial buyout provision from further constitutional scrutiny, however, the City

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[8] AA at 495.

[9] *Id.* at 253.

[10] *Bullock v. City and County of San Francisco*, 221 Cal. App. 3d 1072, 1101 (1990). Interestingly, "ransom" is the same term used by the New York Court of Appeal in describing the buyout provision of a substantially identical New York City regulation. *Seawall Associates v. City of New York*, 542 N.E.2d 1059, 1070 (N.Y.), *cert. denied*, 493 U.S. 976 (1989).

[11] *Golden Gate Hotel Association v. City and County of San Francisco*, 836 F. Supp. 707 (N.D. Cal. 1993), *rev'd on other grounds*, 18 F.3d 1482 (9th Cir. 1994).

[12] *See Residency Hotel Rule for S.F. Put on Hold: City Attorney Says U.S. Judge's Verdict Isn't Binding*, S.F. Examiner, July 1, 1993, at A9 (1993 WL 8579073).



proceeded to bootstrap the provisions of the HCO into its planning code. Hotel owners wishing to rent out their vacant "residential" rooms are now required to obtain a conditional use permit from the City's planning commission. Nevertheless, the legal fiction that vacant hotel rooms require "converting" before they can be rented to tourists stems entirely from the HCO.

### B. The City Tries to Exact $600,000 from the Lamberts in Exchange for Permission to Rent Out Vacant Rooms in the Cornell

In May of 1990, the Lamberts applied for a permit to offer the Cornell's "residential" rooms for rent to overnight guests.[13] Shortly thereafter, the City informed the Lamberts that they were required to obtain a conditional use permit from the planning commission in order to rent out their rooms.[14] While the Lamberts pursued this application, the City obtained two appraisals of their hotel.[15]

The planning commission conducted public hearings on the Lamberts' application in early 1994.[16] At the first of these hearings, the City's staff reported that the commission had complete discretion to respond to the Lamberts' application in any of six ways--from simply granting the permit through demanding various types and levels of exactions. Denying the application outright was not an option under consideration.[17]

Based on the appraisals it had conducted of the Cornell, the City advised the Lamberts that $600,000 would be an

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[13] AA at 257.

[14] *Id.*

[15] *Id.* at 90.

[16] *Id.* at 97.

[17] *Id.* at 203-04.

"appropriate" payment under the HCO to allow the Lamberts to rent out their vacant rooms.[18] The Lamberts countered with an offer of $100,000 for issuance of the required permit, but the City responded that this amount would not be "sufficient" consideration.[19] The City invited the Lamberts to engage in further monetary negotiations for the permit and subsequently cited the Lamberts' refusal to engage in further haggling as evidence supporting the denial of their application.[20]

Although the HCO buyout fee is statutorily defined as 40% (now 80%) of the appraised value of the rooms to be rented out, the City recognizes that the actual amount of the fee to be imposed in any given case is nearly infinitely variable and completely subject to the City's discretion. The City's determination that $600,000 would be the "most appropriate" price for the Lamberts' permit was based on two wildly disparate appraisals, one of which would have supported a fee of $488,584 and the other of $612,887.[21] When the Lamberts refused to pay $600,000 for the permit, the City invited them to submit a lower appraisal--which would be tantamount to offering to pay a lower fee.[22] Only when it became clear that the Lamberts would not budge from their $100,000 counteroffer did the City stop haggling over the price of the permit and deny the Lamberts' application altogether.

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[18] *Id.* at 91.

[19] *Id.* at 100, 102.

[20] *Id.* at 344-45.

[21] *Id.* at 90-91.

[22] The City's invitation to haggle over the amount of the mitigation fee--and the Lamberts' refusal to engage in further bargaining--was actually cited by the City in its statement of undisputed facts in support of its motion for summary judgment in the trial court. *See* AA at 344-45.



### C. When the Lamberts Decline to Pay $600,000 to Ransom Their Rooms, the City Denies Their Permit Application

On March 17, 1994, the City denied the Lamberts' application for a conditional use permit.[23] In its findings, the City acknowledged that no long-term residents would be displaced by granting the permit[24] and that rooms in the Cornell could not rationally be described as part of the City's stock of "affordable housing."[25] (These considerations provide the basic rationale for demanding replacement housing or buyout fees under the HCO.)[26] Nevertheless, the commission also recited the $600,000 fee that it had demanded[27] and the "insufficiency" of the Lamberts' $100,000 counteroffer.[28] Making its point even clearer, the City cited two other nearby hotels that had received identical permits in exchange for payments of $10,000 to $15,000 per room--considerably more than the Lamberts' offer of less than $5,000 per room.[29]

Finally, having documented its failed attempt to obtain a sufficiently large cash payment to induce it to grant the

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[23] *Id.* at 97-105.

[24] Only 2 of the Cornell's 58 rooms were occupied by long-term residents at the time of the application, and the Lamberts had offered lifetime leases to both of them. *Id.* at 98. There are currently no long-term residents at the Cornell. *Id.* at 253.

[25] The commission found that rents at the Cornell Hotel ranged from $1,100 to $1,300 per month for single-occupancy and $1,600 or more per month for double-occupancy rooms. *Id.* at 98.

[26] HCO § 41.2, App. G-1-2.

[27] AA at 100.

[28] *Id.* at 102.

[29] *Id.*

Lamberts' permit, the City invoked standard boilerplate rationalizations for its denial: renting out the Cornell's vacant rooms would allegedly be incompatible with the neighborhood;[30] would not be consistent with the master plan;[31] and would be injurious to "the health, safety, and welfare of the City."[32] Nothing in the commission's findings indicates how a cash payment of $600,000 would have cured these supposed defects, although the record is absolutely clear that such a payment would have secured the issuance of the permit.[33]

### D. The Lower Courts Decline to Apply This Court's *Nollan* Standard to the City's Actions

The Lamberts challenged the City's permit denial as a regulatory taking of their property under *Nollan*. The trial court granted summary judgment to the City, upholding the constitutionality of the City's actions solely on the authority of a substantive due process decision. App. F-1. On the Lamberts' motion for reconsideration the trial court retained its ruling, this time citing to a recent decision of the California Supreme Court. App. E-1.

A divided panel of the California Court of Appeal affirmed. The two-justice majority found that the heightened level of review mandated by this Court in *Nollan* applies only to *successful* exactions in exchange for development permits. App. A-10-11. Because the Lamberts refused to accede to the City's demand for a $600,000 exaction and their permit was therefore denied, the majority refused to examine whether there was an

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[30] *Id.* at 103.

[31] *Id.* at 104.

[32] *Id.* at 105.

[33] "[T]he record is clear that the City sought a mitigation fee from the Lamberts and denied the permit when they failed to offer a satisfactory amount." App. A-16 (Strankman, P.J., dissenting).



essential nexus between the City's demand for cash and the advancement of any legitimate regulatory interest. *Id.* In reaching this conclusion, the majority relied heavily on *Terminal Plaza Corp. v. City and County of San Francisco*, 177 Cal. App. 3d 892 (1986), a pre-*Nollan* case that was decided under the deferential standard of review applicable to due process or equal protection challenges.

In dissent, Presiding Justice Strankman recognized that the heightened judicial review mandated by *Nollan* must be applied in cases such as this one if this Court's landmark decision is "to achieve [its] legal aim." App. A-20 (Strankman, P.J., dissenting). As the Presiding Justice explained:

> I do not believe the results in *Nollan*, *Dolan* and *Ehrlich* would have differed had the regulatory agencies demanded the exaction and then denied the permit when the demand was refused . . . . To believe otherwise is to believe a regulatory agency can evade the constitutional safeguard of heightened scrutiny by a shrewd repositioning of its exaction demands.

*Id.* at A-20-21. This insightful analysis by the Presiding Justice illustrates the need for this Court to resolve the issue of whether its *Nollan* doctrine can be evaded by cash-hungry regulatory agencies by the simple expedient of denying discretionary development permits when extortionary demands are not met.

Petitioners Claude and Micheline Lambert now respectfully ask this Court to issue a writ of certiorari and provide much-needed direction on this important question of federal constitutional law.

## REASONS FOR GRANTING THE PETITION

In the decision below, the California Court of Appeal ruled that the heightened judicial scrutiny mandated by this Court in *Nollan v. California Coastal Commission* does not apply where

a development permit is *denied* when the property owner refuses to comply with an unconstitutional condition. If this decision is allowed to stand, it will open the door to wholesale evasions of *Nollan*. Instead of granting permits subject to exactions that are unrelated to the impact of the proposed use of the property in question, regulatory agencies need merely to demand compliance with the unconstitutional exaction *in advance* and deny the permit outright if the landowner fails to comply. As was noted by the dissenting justice below, such "shrewd repositioning" of exaction demands cannot be allowed to defeat the protection of close judicial review of exaction demands under *Nollan*.

This is the latest in a series of decisions in which the California courts have sought to diminish the scope of this Court's *Nollan* doctrine. *See, e.g., Blue Jeans Equities West v. City and County of San Francisco*, 3 Cal. App. 4th 164, 166 (1992) (holding that *Nollan*, at that time this Court's leading regulatory takings decision, does not apply to regulatory takings); *Del Oro Hills v. City of Oceanside*, 31 Cal. App. 4th 1060, 1073-75 (1995) (holding that the two-pronged, disjunctive regulatory takings standard set forth in *Nollan* is actually a *conjunctive* standard--a taking will be found only when a regulation ***both*** fails to substantially advance legitimate state interests ***and*** deprives the owner of economically viable use of his property). It is grimly ironic that the courts of California--the state whose extortionary land use practices prompted this Court to spell out the requirement of heightened judicial review in *Nollan*--have taken the lead in searching for ways to evade the thrust of that landmark decision.

The holding of the court below, that *Nollan's* "substantial advancement" analysis is not applicable when a development permit is denied, was squarely addressed and rejected by this Court in *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 119 S. Ct. 1624 (1999). In *City of Monterey*, as in the case at bar, a city's denial of a development permit was



challenged as a regulatory taking on the grounds that the city's actions leading up to the permit denial did not substantially advance legitimate state interests. In upholding the finding of takings liability against the City of Monterey on this standard, this Court necessarily rejected the contrary rule applied by the court below in this case. Moreover, since *City of Monterey* was a California case coming to this Court by way of the Ninth Circuit, there is now a conflict between the state and federal courts in California on this important question of federal constitutional law.

This Court should grant certiorari in order to resolve the conflict between the California Court of Appeal, this Court, and the Ninth Circuit on the scope of *Nollan's* heightened review of exactions demanded by local permitting agencies in exchange for the issuance of discretionary land use permits.

## I

## THE QUESTION PRESENTED IS IMPORTANT

### A. This Case Will Determine the Continued Viability of *Nollan* in California

*Nollan v. California Coastal Commission* marks one of this Court's greatest achievements in the field of property rights in the past 20 years.[34] Prior to *Nollan*, constitutional protections of the rights of property owners in California were virtually nonexistent. State and local regulators routinely

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[34] *See, e.g.*, Robert Meltz, Dwight H. Merriam, and Richard M. Frank, *The Takings Issue* 137-38 (1999) ("*Nollan* was the first case in which the 'substantially advancing' prong of the *Agins* test was actually relied upon to find a regulatory taking"); Rigoberto V. Obregon and Rebekah L. Parker, *Comment: "Get It Right the First Time": A Message from the United States Supreme Court to Land Use and Environmental Regulators--A Comment on Nollan and First English*, 7 UCLA J. Envtl. L. & Pol'y 173, 174 (1988) (*Nollan* "will materially affect the manner in which state and local governments enact land use and environmental regulations").

conditioned the issuance of land use permits with arbitrary exactions of cash or realty, regardless of any impact the proposed use of property might have on the community. This practice was warmly endorsed by the California courts:

> As we pointed out in *Remmenga v. California Coastal Com.* (1985) 163 Cal.App.3d 623, 628, 209 Cal.Rptr. 628, the justification for required dedication is not limited to the needs of or burdens created by the project.

*Nollan v. California Coastal Commission*, 177 Cal. App. 3d 719, 723 (1986). The state judiciary refused to apply any meaningful review to permit conditions to ensure that local regulators were not simply extorting assets from property owners in exchange for permits. *Id.* at 722.

In contrast, this Court's *Nollan* decision established a workable balance in the context of permit conditions:

> [Under *Nollan*] government agencies may continue to use innovative land use regulations that balance the benefits of an exaction program with the burdens of covered construction. Zoning authorities may not, however, accumulate societal gains at the expense of innocent individuals under the facade of an exaction program.

John P. O'Connor, Jr., Note, *Extortion Loses a Synonym Thanks to Court Ordered Accountability in Land Use Exaction Programs*, 57 U. Cin. L. Rev. 397, 421 (1988).

Now, under the decision below, this balance will be shattered. The City has pointed the way for all California land use regulators to resume their pre-*Nollan* practice of "accumulating social gains" at the expense of permit applicants, through the simple expedient of demanding cash in advance for development permits.



If *Nollan* is to continue to achieve its purpose in the face of "shrewd repositioning" of exaction demands by cash-hungry regulatory agencies, this Court must make it clear that heightened scrutiny is not limited to cases involving the actual issuance of conditional permits. Instead, close review under *Nollan* must be triggered by evidence that an agency has sought to obtain an individualized, discretionary financial exaction in the course of processing an application for a development permit.

### B. The Importance of This Case Is Underscored by Amicus Briefs Filed with the California Supreme Court by the State of California and Sixty California Cities

The singular importance of this case was reflected by the large number of briefs amicus curiae filed in support of both sides while this matter was pending before the California Supreme Court. Briefs were filed by the State of California, 60 California cities, the Western Center on Law and Poverty, the Council of Community Housing Organizations, the Southern California Association of Non-profit Housing, the Tenderloin Housing Clinic, the Golden Gate Hotel Association, San Francisco Hotel Association, and the San Francisco Apartment Association. The significance of the issues raised by this case is best illustrated by the governmental entities that submitted briefs *in support of the City*.

On March 25, 1999, the State of California filed a brief amicus curiae in support of the City with the California Supreme Court. In this brief, the Attorney General of the State of California stated:

> ***This case is of major consequence to California, its political subdivisions, and its residents because it raises a critical question concerning implementation of the doctrine of "regulatory takings," which is itself a matter of significant***

> ***interest in the development of constitutional and environmental law.***

Brief of the State of California in Support of Respondents at 1 (emphasis added). The Attorney General continued:

> ***The issue raised by this case is of great importance to California and to its 58 counties and approximately 500 cities. . . . The issue presented by this case is of major consequence to California as it oversees and implements this interrelated scheme of land use regulatory laws. A failure by this Court to sustain the decision below would greatly impair the ability of California and its political subdivisions to carry out their land use planning and permitting responsibilities.***

*Id.* at 4, 6 (emphasis added).

To an observer outside the State of California, it might seem incredible that the state and its cities would consider themselves seriously threatened if landowners could sue under the Fifth Amendment when development permits are denied for failure to make large cash payments to the appropriate regulatory agencies. Sadly, however, this is an accurate assessment of the state of land use regulation in California today. As the amicus brief filed by 60 California Cities put it,

> applying *Nollan/Dolan* to permit denials ***would have a devastating impact*** on the ability of local governments to regulate land uses within their boundaries.

Brief of 60 California Cities in Support of Defendants and Respondents at 7 (emphasis added). This suggests that California's cities may consider this case as significant as *Nollan* itself, since these governmental entities used virtually identical terminology to describe *Nollan's* importance in an amicus brief to this Court 12 years ago:



> A finding by this Court that dedication requirements are . . . subject to stricter scrutiny than other regulatory actions is legally insupportable and would have ***drastic implications***. . . . [It] would ***deprive state and local governments of one of their most essential planning tools***.

*Nollan v. California Coastal Commission*, Amicus Brief of 46 Cities, Six Counties, and the County Supervisors Association of California in Support of Respondent at 2 (emphasis added).

That California's cities believe their regulatory regimes would be *devastated* by close judicial review of extortionary practices such as those in the case at bar dramatically underscores the need for this Court to grant the petition for certiorari. If *Nollan's* protections are being routinely evaded by local governments "shrewdly repositioning" their exaction demands, intervention by this Court is imperative.

## II

## IF A $600,000 EXACTION WOULD TRIGGER HEIGHTENED SCRUTINY UNDER *NOLLAN* IF IMPOSED AS A CONDITION TO THE GRANTING OF A DEVELOPMENT PERMIT, THE CITY MUST NOT BE ALLOWED TO EVADE JUDICIAL REVIEW BY DEMANDING THE $600,000 IN ADVANCE, AND THEN DENYING THE LAMBERTS' PERMIT WHEN THE CASH IS NOT FORTHCOMING

The court below held that *Nollan's* "substantial advancement" standard does not apply when development permits are *denied*, since "neither a property right nor money was in fact taken from Lambert." App. A-12. Although *Nollan* would surely have come into play if the City had demanded its $600,000 as a condition *subsequent* to the issuance of the Lamberts' permit, the Court below found the *Nollan* analysis to have no applicability when the same $600,000 was demanded as a condition *precedent*. *Id.*

This holding is not simply erroneous; it threatens to strip this Court's "substantial advancement" standard of any utility in deterring predatory regulators from demanding exactions unrelated to the impact of proposed uses of property. If the City's $600,000 exaction would have been struck down as unconstitutional if demanded as a condition to the issuance of the Lamberts' permit, the denial of the permit following the Lamberts' refusal to pay the $600,000 must be seen as equally illicit.

### A. The Exaction of a $600,000 Buyout to Allow a Hotel to Rent Out Its Vacant Rooms Would Not Withstand Constitutional Scrutiny Under *Nollan*

If the City had actually granted the Lamberts' conditional use permit subject to payment of the $600,000 HCO buyout, the fee could have been successfully challenged under *Nollan*. The exaction would have triggered "heightened" or "intermediate" scrutiny, a level of constitutional review the $600,000 exaction could not possibly withstand.

#### 1. Close Judicial Scrutiny of the City's $600,000 Exaction Would Be Required Under *Nollan*

In *Nollan v. California Coastal Commission*, this Court established that regulatory takings challenges to the imposition of development exactions must be accorded heightened judicial scrutiny:

> [O]ur opinions do not establish that [takings] standards are the same as those applied to due process or equal protection claims. To the contrary, . . . [w]e have required that the regulation "substantially advance" the "legitimate state interest" sought to be achieved, not that "the State '*could rationally have decided*' that the measure adopted might achieve the State's objective."

483 U.S. at 834 n.3 (citations omitted).



*Nollan* established the basic requirement for constitutional review of exactions that are demanded as a condition to the issuance of discretionary land use permits. That requirement is that there must be an essential nexus between the demanded exaction and the alleviation of some public harm that would be generated by the owner's proposed use of his property. 483 U.S. at 836-37.

The City's proposed $600,000 exaction is precisely the sort of measure that would be struck down under *Nollan*, if it were straightforwardly imposed as a condition to the issuance of the Lamberts' permit.[35] The City exercised broad discretion both in determining that the Cornell Hotel was subject to the HCO (and to its tag-on requirement of a conditional use permit), and then in establishing how much the Lamberts would have to pay to buy their way out of this classification. Although one of the City's appraisals supported a mitigation fee of $488,584,[36] the City determined that the "most appropriate" fee would be $600,000.[37] When the Lamberts countered with an offer of $100,000 for the permit,[38] the City found the counteroffer

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[35] Indeed, ten years ago the New York Court of Appeals struck down a measure substantially identical to the HCO, finding that requiring hotel owners to rent their rooms to "residential" tenants or pay a buyout fee could not survive the "semi-strict or heightened judicial scrutiny of regulatory means-ends relationships" required by *Nollan*. *Seawall Associates v. City of New York*, 542 N.E.2d at 1068.

[36] App. A-14.

[37] *Id.*

[38] AA at 100.

insufficient[39] but invited further bargaining by the Lamberts.[40] It is hard to imagine a closer approximation to the regulatory bargaining envisioned by Justice Scalia as the antithesis of the *Nollan* doctrine:

> One would expect that a regime in which this kind of leveraging of the police power is allowed would produce stringent land-use regulation which the State then waives to accomplish other purposes . . . .

*Nollan*, 483 U.S. at 837 n.5.

**2. There Is No Nexus Between the Prevention of the Lamberts' Use of Vacant Hotel Rooms for Tourist Rentals and the Stated Goals of the Hotel Conversion Ordinance**

If the City's $600,000 exaction were subjected to heightened scrutiny it would obviously fail to pass *Nollan's* nexus requirement. The stated purpose of the City's Hotel Conversion Ordinance is

> [t]o benefit the general public by minimizing adverse impact on the housing supply and on displaced low income, elderly and disabled persons resulting from the loss of residential hotel units through their conversion and demolition.[41]

The record below shows that allowing the Lamberts to rent out their vacant rooms would have had no adverse impacts whatsoever on the City's low-income housing supply, nor would it have contributed to the displacement of any low-income, elderly, or disabled persons. The sole effect of the $600,000

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[39] *Id.* at 102.

[40] *Id.* at 344-45.

[41] HCO § 41.2, App. G -1-2.



exaction would have been to swell the City's revenues, not to mitigate any adverse impact of the Lamberts' proposed use of their property.

The City's own Annual Unit Usage Report found that there was a glut of vacant "residential" hotel rooms in San Francisco at the time of the Lamberts' application. A survey conducted by the Bureau of Building Inspection on July 5, 1994, established that there were 5,066 vacant rooms classified as "residential" in the 528 small hotels subject to the HCO.[42] This was a vacancy rate of nearly 30%.[43] The record further shows that there are no "long-term" residents at the Cornell Hotel who could be displaced by the "conversion" of the hotel's vacant rooms to tourist use.[44] Thus, allowing the Lamberts to rent out their empty rooms to tourists could not possibly have contributed to the problems the HCO was ostensibly designed to remedy, and the $600,000 exaction could not have "mitigated" these nonexistent harms.

No relationship has been shown between renting rooms in the Cornell Hotel and the problem of homelessness, nor are the Lamberts' so-called "residential" rooms earmarked for use by the homeless. The only nexus that appears from the record is between the City's desire for cash and its power to prevent the Lamberts from making lawful and productive use of their property. This falls far short of meeting the requirements set down by this Court in *Nollan*.

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[42] AA at 486-95.

[43] *Id.* This was not a statistical aberration. The City recognized that hotels such as the Cornell had vacancy rates of 26.82% in 1992 and 26.79% in 1993. *Id.* at 101.

[44] *Id.* at 253.

**B. If Heightened Scrutiny Is Required When a City Grants a Discretionary Permit Conditioned on Payment of a $600,000 Exaction, It Must Also Be Required When the Permit Is Denied Following an Unsuccessful Attempt to Exact the Same $600,000 in Advance**

The resolution of this case would be easy if the City had formally conditioned the issuance of the Lamberts' permit upon payment of the $600,000 mitigation fee. Under *Nollan*, the courts would have applied heightened scrutiny, the exaction would have been invalidated, and the Lamberts would have received their permit without having to pay the exaction.

The City sought to avoid this outcome by shrewdly withholding the permit until the $600,000 was in hand.[45] When the Lamberts balked at paying the unconstitutional exaction, the City simply denied their permit outright. Although nothing has changed except the timing of the City's illicit demand for cash, this approach successfully evaded close review by either the trial court or the court of appeal. Yet the policy considerations that mandated heightened scrutiny in *Nollan* are equally present in this situation. If close scrutiny would be warranted if the Lamberts' permit had been issued subject to a $600,000 exaction, the same heightened standard of review should be triggered by the City's denial of the permit for failure to pay the fee.

**C. Permitting Agencies Must Not Be Allowed to Evade This Court's *Nollan* Doctrine by a "Shrewd Repositioning" of Their Exaction Demands**

The point of *Nollan's* heightened scrutiny requirement is to protect individuals who need discretionary permit approvals

[45] The City's next step would have been to require the Lamberts to waive their right to make the payment under protest, thereby insulating the illicit exaction from any judicial review. This aspect of the City's permits-for-cash scheme was documented in the amicus brief of the Golden Gate Hotel Association and San Francisco Hotel Association to the California Supreme Court.



from improper leveraging of the police power by cash-hungry regulators.[46] In *Nollan*, the California Coastal Commission's demand for land in exchange for a building permit was described as an "out-and-out plan of extortion,"[47] which could only be thwarted if reviewing courts were willing to closely review the regulators' actions.

The threat of regulatory extortion does not depend on whether the agency grants a permit with a condition or denies the permit when the condition is not met. As Presiding Justice Strankman observed in his dissent below, there is no reason to believe the outcome in *Nollan* would have differed "had the regulatory agencies demanded the exaction and then denied the permit when the demand was refused." App. A-20-21 (Strankman, P.J., dissenting).

As the dissent below makes clear, the facts of this case *should* trigger heightened judicial scrutiny as a logical extension of this Court's holding in *Nollan*. Every indicator of improper leveraging by land use regulators is present in this case. When the Lamberts failed to submit to a $600,000 exaction the City denied their permit application without even attempting to demonstrate that renting out vacant rooms in the Cornell Hotel would displace residents or deny housing to any group protected by the Hotel Conversion Ordinance. The majority below found it "***somewhat disturbing***" that the City offered to waive its supposed police power concerns for a large cash payment, but nevertheless deferred completely to the City's ruse. App. A-11.

There is no logical basis for the ruling of the majority below that *Nollan* has no applicability when a development permit is denied, rather than issued subject to an exaction. A respected legal treatise on zoning and planning law questions whether "the result in *Nollan* would have been different" if the

[46] *See Nollan*, 483 U.S. at 837, 837 n.5.

[47] *Id.* at 837.

Coastal Commission had denied the Nollans' permit application outright for failure to hand over the property interest the Commission demanded.[48] As the dissent below explains, failing to recognize this equivalence presents a blank check to regulatory agencies, allowing them to

> evade the constitutional safeguard of heightened scrutiny by a shrewd repositioning of [their] exaction demands.

App. A-21 (Strankman, P.J., dissenting).

This cannot be what this Court intended in *Nollan*. Complying with the Takings Clause must require "more than an exercise in cleverness and imagination"[49] if *Nollan* is to offer the protection to property owners this Court intended.

### D. It Is Immaterial That the City Did Not Acquire Something Tangible from the Lamberts Because the Constitution Protects Rights, Not Things

The key to the erroneous holding below may lie in a fundamental misconception by the *Lambert* majority that the Constitution protects *tangible things* instead of *rights*. If $600,000 had actually changed hands in exchange for the Lamberts' permit, the majority below would presumably have found a taking. If an easement or other interest in real property had been seized in exchange for the conditional use permit, the majority below would presumably have not hesitated to apply *Nollan*. But since neither land nor money was actually acquired by the City, the majority mistakenly concluded the protections of the Takings Clause were not implicated. App. A-12.

It has been well accepted for most of this century that protected property interests under the Constitution consist not

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[48] 1 Rathkopf, *The Law of Zoning and Planning* § 6.10(d) at 6-110 (4th ed. 1997).

[49] *Nollan*, 483 U.S. at 841.



of tangible objects but of "bundles" of rights.[50] Chief among the protected interests comprising property are the rights of possession, disposition, and use.[51] As to the third of these incidents of ownership, this Court has noted that "[w]e have little difficulty accepting the theory that *the use of valuable property . . . is itself a legally protectable property interest.*"[52] The Constitution is unswerving in its protection of the rights of individuals to use private property, subject only to *legitimate* police power restrictions:

> *[W]henever* the state takes *any* user right out of Jones' bundle and puts it in *any* other bundle, private property should be understood to have been taken.[53]

When overreaching regulation interferes with what would otherwise be a lawful and productive use of private property, the protections of the Takings Clause are triggered. In *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1994), the State of South Carolina acquired nothing tangible from David Lucas, but the state's wrongful interference with Mr. Lucas' right to build a home on his property was found to violate the Takings Clause. By the same token nothing tangible was actually acquired by the Coastal Commission in *Nollan*; the

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[50] *See, e.g., Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979).

[51] *See, e.g., Blacks Law Dictionary* (abridged 5th ed. 1983), entry for "property."

[52] *Dickman v. Commissioner of Internal Revenue*, 465 U.S. 330, 336 (1984) (emphasis added).

[53] Bruce A. Ackerman, *Private Property and the Constitution* 28 (1977) (emphasis in original). *Accord* Richard A. Epstein, *Takings: Private Property and the Power of Eminent Domain* 57 (1985) ("Let the government remove any of the incidents of ownership, let it diminish the rights of the owner in any fashion, then it has prima facie brought itself within the scope of the eminent domain clause.").

Nollans were simply put on notice that they would be required to submit to certain demands *if they wished to avail themselves of their right to build a home on their property.*

> In both *Nollan* and *Lucas*, the [Supreme Court] made it clear that heightened judicial scrutiny will be applied when property rights are being significantly diminished by regulation or exaction.[54]

In short, the violation of the Takings Clause alleged by the Lamberts does not hinge on whether the City actually acquired their property or money, but on whether the City improperly interfered with the Lamberts' right to make productive use of their property for its intended purpose as a hotel. This is not a question that can be disposed of by deferring completely to the City's own account of the matter.

The City has made no serious effort to establish a legitimate police power rationale for forcing the Lamberts to maintain vacant rooms in their hotel. To the contrary, the undisputed facts advanced by the Lamberts in the trial court demonstrate that the City's predominant, if not its sole, concern was simply to increase its revenues to the tune of $600,000.

This is not a legitimate police power rationale. The facts adduced by the Lamberts should have triggered heightened judicial scrutiny of the City's actions under *Nollan*, regardless of the fact that the City did not actually acquire any tangible assets from the Lamberts.

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[54] William C. Leigh and Bruce W. Burton, *Predatory Governmental Zoning Practices and the Supreme Court's New Takings Clause Formulation: Timing, Value, and R.I.B.E.*, 1993 BYU L. Rev. 827, 840 n.65.



## III

## THIS COURT, IN *CITY OF MONTEREY v. DEL MONTE DUNES*, RECENTLY AFFIRMED THAT *NOLLAN'S* "SUBSTANTIAL ADVANCEMENT" STANDARD IS APPROPRIATE IN EVALUATING WHETHER THE DENIAL OF A DEVELOPMENT PERMIT VIOLATES THE TAKINGS CLAUSE

The central holding of the court below is that *Nollan's* heightened standard of review does not apply when a development permit is denied for failure to comply with an unconstitutional precondition:

> [A]s neither a property right nor money was in fact taken from Lambert . . . there is nothing requiring review under the *Nollan/Dolan/Ehrlich* standard.

App. A-12. This holding was squarely rejected by this Court some 20 months later in *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 119 S. Ct. 1624.

*City of Monterey*, like the case at bar, involved a regulatory taking claim based on the wrongful denial of a discretionary development permit. *Id.* at 1631. The jury was instructed to find that Monterey's denial of the permit in question violated the Takings Clause if it found that "'the city's decision to reject the plaintiff's 190 unit development proposal did not substantially advance a legitimate public purpose.'" *Id.* at 1634 (citation omitted). The trial court plainly invoked *Nollan's* heightened standard of review, instructing the jury to decide whether the permit denial satisfied the substantial advancement standard by a preponderance of the evidence. *Id.* The Ninth Circuit Court of Appeals agreed with the trial court that the constitutionality of Monterey's actions depended on "whether the city's denial of the final proposal substantially advanced legitimate public interests." *Id.*

This Court affirmed the finding of a compensable taking based on the denial of Del Monte Dunes' development permit. *Id.* at 1631. Although the majority opinion did not endorse the applicability of *Dolan's* "rough proportionality" test in this context, *id.* at 1635, the Court plainly affirmed the applicability of the *Nollan* analysis to permit denials:

> [A]lthough this Court has provided neither a definitive statement of the elements of a claim for a temporary regulatory taking nor a thorough explanation of the nature or applicability of the requirement that a regulation substantially advance legitimate public interests outside the context of required dedications or exactions . . . ***we note that the trial court's instructions are consistent with our previous general discussions of regulatory takings liability.***

*Id.* at 1636 (emphasis added).

Thus the core holding of the court below, that *Nollan's* "substantial advancement" analysis is inapplicable to permit denials, was flatly contradicted by this Court's opinion in *City of Monterey*. The interests of justice required the California Supreme Court to reverse the decision below in light of *City of Monterey*, but the state's highest court chose instead to dismiss its own order granting review. App. B-1. The California Supreme Court's action leaves the Lamberts suffering a manifest injustice which this Court should resolve by granting the writ of certiorari or alternatively by summarily reversing the court of appeal and remanding for reconsideration in light of this Court's opinion in *City of Monterey*.



## CONCLUSION

For all the above reasons, the petition for a writ of certiorari should be GRANTED.

DATED: October, 1999.

Respectfully submitted,

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**Filed 9/23/97**

**CERTIFIED FOR PUBLICATION**

**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FIRST APPELLATE DISTRICT**
**DIVISION ONE**

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| CLAUDE LAMBERT, et al.,<br><br>Plaintiffs and Appellants,<br><br>v.<br><br>CITY AND COUNTY OF SAN FRANCISCO, a California municipal corporation, et al.,<br><br>Defendants and Respondents. | A076116<br><br>(San Francisco County Super. Ct. No.963368) |

Claude and Micheline Lambert (hereafter, "Lambert") are the owners of the 58-unit Cornell Hotel in San Francisco. Lambert filed the present action to challenge the decision of San Francisco's Planning Commission disapproving his application to convert 24 of the hotel's units from long-term residential use to tourist use. The trial court rejected the challenge, granting summary judgment to San Francisco. We will affirm.

## FACTUAL/PROCEDURAL BACKGROUND

In 1979, San Francisco's Board of Supervisors took action in response to concerns that the city had a serious housing shortage for low income and elderly residents caused by the conversion of residential hotels into tourist hotels or condominiums. These concerns, originally addressed by a moratorium on the demolition or conversion of residential hotel units, resulted in the adoption of 1981 legislation limiting the ability of

hotel owners, such as Lambert, to convert existing residential units to tourist units. Lambert's proposed conversion is affected by two interrelated bodies of local law: San Francisco's Planning Code, and San Francisco's Hotel Conversion Ordinance (the "HCO"). The Cornell hotel is located in a district zoned for high density residential-commercial use. The Planning Code provides that tourist hotels in that zone are permitted only upon the granting of conditional use authorization by the Planning Commission. (§ 209.2(e).) To the extent a hotel has been operated as a tourist hotel in the past, that use is considered a permitted conditional use, but it may not be "significantly altered, enlarged, or intensified, except upon approval of a new conditional use application." (§ 178(a)(2), and (c).) The HCO, as relevant, prohibits hotel owners from converting residential hotel units to tourist units without first obtaining a permit from the Planning Commission. (HCO § 41.6) The HCO further provides that before a permit may be issued, the owners must provide for one-to-one replacement of the units either by adding replacement units to San Francisco's residential housing stock, or by paying an amount equal to the costs of rebuilding an equal number of legal, comparable units. (HCO § 41.7) Thus, an owner such as Lambert who desires to convert existing residential hotel units to tourist units must obtain both a conditional use permit under the Planning Code and permission under the HCO to convert the units, permission that may be given only if the owner replaces the units or agrees to pay the costs of constructing like units.

In October 1981, in compliance with the HCO, Lambert reported that the Cornell Hotel had 31 residential units and 27 tourist units. In 1990, Lambert applied to the Planning Commission for a conditional use permit to convert all of the hotel's residential units to tourist. The Planning Commission ultimately denied Lambert's request for a conditional use permit, finding that the proposed use was neither desirable nor necessary, would be injurious to personal and property interests in the



neighborhood and the community and would be inconsistent with the policies and objectives of San Francisco's Master Plan. Lambert then petitioned the superior court for a writ of administrative mandate, challenging the decision to deny his application for a conditional use permit.

In the meantime, in 1993, and notwithstanding that Lambert himself had reported that the Cornell Hotel had both residential and tourist units, Lambert applied to the Zoning Administrator for a formal determination of the use classification of the hotel and whether it might be converted to full tourist use without a conditional use permit. The Zoning Administrator determined, in accordance with Lambert's earlier representations, that 31 of the hotel's units were residential and 27 units were tourist. The Administrator further determined that Lambert could convert the hotel to a tourist hotel only upon receiving conditional use authorization. Lambert appealed that determination. The Board of Permit Appeals, partially overruling the Zoning Administrator, found that seven of the units classified as residential properly should be classified as tourist because they were legal non-conforming commercial units.[1] As a result, Lambert was entitled to reclassify seven units from residential to tourist. The practical result of the Board's ruling was that Lambert was entitled to use the seven units for tourist purposes without obtaining a conditional use permit. The remaining 24 rooms originally classified for residential use, however, were still classified for residential use under the Planning Code. It followed that they could be converted to tourist use only upon obtaining a conditional use permit.

To complicate things further, the seven reclassified units continued to be classified as residential units for purposes of the HCO. The Planning Commission accordingly ruled that

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[1] The reclassification resulted from that fact that the HCO permitted summer tourist use of no more than 25 percent of the total residential units in a hotel such as the Cornell Hotel.

Lambert could not convert them to tourist use without complying with the HCO's one-for-one provisions. Lambert filed a second action in the superior court. Where the first action challenged the decision to deny Lambert conditional use authorization as to the units still classified residential, the second action challenged the decision to require him to comply with the one-for-one provisions of the HCO as to the seven units newly classified for tourist use. The superior court consolidated the two actions. It later granted the petition for writ of mandate as to the second action, severed the cases and remanded to the Board of Permit Appeals the issue of whether a permit to convert the seven units to tourist units should be conditioned on Lambert's compliance with the one-for-one provisions of the HCO. The Board of Permit Appeals resolved the matter by finding that the units could be converted without compliance with the one-for-one provisions.

The present case therefore does not concern the decision to require Lambert to comply with the one-for-one provisions under the HCO, which decision reached only the seven newly classified units and in all events was reversed by the Board of Permit Appeals. Rather, the present case concerns the Planning Commission's decision to deny Lambert's application for a conditional use permit to convert the remaining 24 residential units to tourist use. Lambert's theory in the trial court was that the denial of the permit constituted an unlawful taking. The superior court found that the denial of the permit was not a taking, and granted summary judgment on that basis.

## DISCUSSION

### I

### Neither San Francisco's Regulations Nor the Refusal to Grant the Conditional Use Permit Effected a "Taking"

Lambert does not directly challenge the validity of the local regulations themselves, and thus does not challenge the right of the Planning Commission to require him to obtain a conditional



use permit to convert his residential units to tourist use.[2] Nonetheless, it is appropriate to point out that in *Terminal Plaza Corp. v. City and County of San Francisco* (1986) 177 Cal. App.3d 892, we upheld the HCO against claims that it violated principles of due process and equal protection, finding that "when tested according to traditional due process and equal protection standards, there can be little dispute that the ordinance serves a legitimate governmental interest, and does so by means reasonably and directly related to its goals." (*Id.* at p. 910.) We also rejected the argument that by restricting the use of residential hotel property the HCO effected a taking in violation of Amendment V of the United States Constitution and article I, section 19 of the California Constitution. (*Id.* at pp. 911-912.)

We see no reason to revisit our earlier decision here in any detail. As a general rule, no taking results from the down-zoning of property in such a manner as to limit its potential for development. "'A purchaser of land merely acquires a right to continue a use instituted before the enactment of a more restrictive zoning. Public entities are not bound to reimburse individuals for losses due to changes in zoning, for within the limits of the police power "some uncompensated hardships must be borne by individuals as the price of living in a modern enlightened and progressive community." (*Metro Realty v. County of El Dorado* [1963] 222 Cal.App.2d 508 . . . .)' [Citation.]" (*HFH, Ltd. v. Superior Court* (1975) 15 Cal.3d 508, 516, citing *Morse v. County of San Luis Obispo* (1967) 247 Cal. App.2d 600, 602-603.) In such cases, a taking occurs only if the application of the general zoning law to the particular

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[2] *152 Valparaiso Associates v. City of Cotati* (July 22, 1997, A075553) ___ Cal.App.4th ___ is not applicable here because the plaintiff there were challenging the regulations — rent control laws — limiting their use of their property. Lambert is not challenging the regulation at issue, but the administrative decision to deny him a conditional use permit.

property does not substantially advance legitimate state interests or denies an owner economically viable use of his land. (*Agins v. City of Tiburon* (1980) 447 U.S. 255, 260.) That application of a general zoning law reduces the value of land is not a denial of economically viable use of the land. "[U]nlike a regulation which effects a taking by prohibiting all economically beneficial uses of the land in question (see *Lucas, supra*, [*Lucas v. So. Carolina Coastal Council* (1992) 505 U.S. __ [120 L.Ed.2d 798, 112 S.Ct. 2886], [120 L.Ed.2d at pp. 814-815]), the promulgation of a zoning law which results in only a diminution in the value of the affected property is not a taking. (*Euclid v. Ambler Co.* (1926) 272 U.S. 365, 396-397 [71 L.Ed. 303, 314-315, 47 S.Ct. 114, 54 A.L.R. 1016]; *HFH Ltd. v. Superior Court* (1975) 15 Cal.3d 508, 514-515, 518 [125 Cal.Rptr. 365, 542 P.2d 237.]) [¶] The denial of the highest and best use does not constitute an unconstitutional taking of property. (*Long Beach Equities, Inc. v. County of Ventura* (1991) 231 Cal.App.3d 1016, 1036 [282 Cal.Rptr. 877], cert. den. (1992) __ U.S. __ [120 L.Ed.2d 898, 112 S.Ct. 3027].) Even when there is a very substantial diminution in the value of land, there is no taking. ([*MacLeod v. Santa Clara County* (9th Cir. 1984) 749 F.2d 541], 547-548, citing *Hadacheck v. Sebastian* (1915) 239 U.S. 394 [60 L.Ed. 348, 36 S.Ct. 143]--diminution in value from $800,000 to $60,000 not a taking; *William C. Haas v. City & Cty. of San Francisco* (9th Cir. 1979) 605 F.2d 1117, 1120--diminution in value from $2 million to $100,000 not a taking.)' (*Long Beach Equities, Inc.* supra, 231 Cal.App.3d at p. 1036.)" (*Ramona Convent of the Holy Names v. City of Alhambra* (1993) 21 Cal.App.4th 10, 22-23.) In the present case, as we noted in *Terminal Plaza*, the enactment of the HCO and the amendment of the Planning Code limiting the ability of landowners to convert residential hotel units to tourist units, substantially furthered legitimate interests in ensuring the existence of affordable residential housing, did so by a means reasonably and directly related to its goals, and did not deprive hotel owners, such as Lambert, of the



economically viable use of their property. (See *Terminal Plaza Corp. v. City and County of San Francisco, supra*, 177 Cal.App.3d at pp. 910-912.) It follows that the restriction on development resulting from these laws, in and of itself, is not a "taking."

Lambert's argument, reduced to its essentials, is that a taking occurred when the Planning Commission refused to grant a conditional use permit to except the Cornell Hotel from the limitations imposed on his hotel, and all others, by the local regulations. In analyzing this contention, we begin by noting that in applying for the conditional use permit Lambert was seeking to alter an existing use. He therefore was applying for a property right he did not have. San Francisco's refusal to issue the permit thus deprived him of nothing. Comments made by the court in *Terminals Equipment Co. v. City and County of San Francisco* (1990) 221 Cal. App.3d 234, 244 are apposite: "The regulations at issue in this case are only operating to restrict new uses of the subject Property, not to eliminate existing ones. There is no constitutional right on the part of landowners to develop their property for maximum economic profit, or to receive compensation when land use regulations restrict their ability to do so. As stated by the United States Supreme Court: "[T]he submission that appellants may establish a "taking" simply by showing that they have been denied the ability to exploit a property interest that they heretofore had believed was available for development is quite simply untenable. [Citations.]"

Lambert, however, argues there is a triable issue of fact as to whether a taking occurred because the record contains evidence that San Francisco would have granted the conditional use permit had he agreed to pay $600,000. The issue here, however, is not whether a taking occurred, because San Francisco took neither $600,000 nor a permitted use from Lambert. It simply denied him a conditional permit to exploit a property interest. The question is whether San Francisco denied

the permit for improper reasons. The Planning Commission found that the proposed conversion would not provide a development that is necessary or desirable for, and compatible with, the neighborhood and community. In support of that finding, the Planning Commission noted that the hotel was located in a neighborhood of mixed residential and commercial use, and that the current mix of uses at the Cornell Hotel was compatible with the neighborhood. It noted that Lambert had failed to demonstrate that there was insufficient demand for such group (i.e., residential) housing as exists at the Cornell Hotel. It noted that the classification of the area as mixed residential/commercial preserved important housing resources near the downtown area. The Planning Commission also found that the proposed conversion would be injurious to property, improvements or potential development. In support of this finding, the Planning Commission noted that long-term tenancy in group housing would provide for a more stable resident population. The proposed conversion could be expected to increase the number of tour bus, taxicab and other forms of chartered transportation with an attendant increase in parking and traffic congestion. Finally, the Planning Commission found that San Francisco's housing stock must be preserved and that the proposed conversion would not promote several policies and objectives of San Francisco's Master Plan. These are (1) to retain the existing supply of housing, (2) to maintain and improve the physical condition of housing while maintaining existing affordability levels and (3) to provide a quality living environment.

Where, as here, no taking occurred, our task is to determine whether substantial evidence supports the administrative agency's findings and whether the findings support the agency's decision. (*Topanga Assn. for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 514-515; *Harris v. City of Costa Mesa* (1994) 25 Cal. App.4th 963, 969; *PMI Mortgage Ins. Co. v. City of Pacific Grove* (1981) 128 Cal.App.3d 724,



729.) The evidence here fully supports both the findings and the decision. It is not, nor can it be, contested that San Francisco has a legitimate interest in preserving affordable residential housing stock, ensuring adequate residential housing in the downtown area, preventing an increase in traffic congestion and parking and in providing a quality living environment. There is no question but that requiring a conditional permit before existing housing stock can be converted to commercial use substantially furthers that legitimate interest. There is no question but that denying a permit to convert residential housing to tourist use also furthers that legitimate interest. Indeed, Lambert does not appear to claim otherwise. He argues that the action of denying *him* a conditional use permit did not further this interest, citing evidence that there were only two long-term residents living in the Cornell Hotel, that he had offered these residents life-time leases and that there are a large number of vacant residential units in San Francisco. That few of the Cornell's rooms currently are occupied by long-term residents, however, does not mean that there are no persons interested in establishing a long-term residency there. The Planning Commission found that Lambert had "failed to demonstrate there is insufficient demand for such group housing as exist[s] at the Cornell Hotel. Marketing of potentially desirable group housing, possibly including the provision of certain meals (as currently offered to residents and guests) may result in full occupancy to meet the operational needs of [Lambert]." Lambert's evidence further does nothing to dispute the findings that the continued use of the property would serve to preserve the character of the neighborhood, would preserve the availability of affordable housing, and would prevent additional traffic congestion and parking.

In conclusion, the HCO and the amendments to San Francisco's Planning Code meet constitutional requirements and did not and do not effectuate a taking on affected hotel owners such as Lambert. The decision to deny Lambert a conditional

use permit also did not effect a taking. Finally, substantial evidence supports the Planning Commission's findings that denial with further legitimate governmental interests.

## II

### The Standard of Review Stated in *Nollan v. California Coastal Comm'n* (1987) 483 U.S. 825; *Dolan v. City of Tigard* (1994) 512 U.S. 374 and *Ehrlich v. City of Culver City* (1996) 12 Cal.4th 854 Has No Application Here

Lambert contends that the trial court erred in failing to apply the strict scrutiny standard of review stated in *Nollan v. California Coastal Comm'n* (1987) 483 U.S. 825; *Dolan v. City of Tigard* (1994) 512 U.S. 374 and *Ehrlich v. City of Culver City* (1996) 12 Cal.4th 854. These cases, however, define the standard of review to be applied in circumstances that do not exist here: that occurring when an issuing agency demands some sort of exaction as a condition of issuing a conditional use permit.

In *Nollan v. California Coastal Comm'n, supra*, 483 U.S. 831, the local authority conditioned a permit to rebuild a beach front residence on establishing a public easement across the property. The Supreme Court found that the condition would be an unconstitutional taking unless it bore a sufficient nexus to the purpose being advanced by requiring the condition. (*Id.* at pp. 836-837.) In *Dolan v. City of Tigard* (1994) 512 U.S. 374, the court held that requiring an owner to dedicate to the public a portion of her land as a condition of a proposed development would be a taking unless it not only bore a sufficient nexus to the purpose being advanced by requiring the condition, but demanded a degree of exaction roughly proportional to the impact of the proposed development. (*Id.* at pp. 391, 395-396.) As this state's high court summarized: "Where the local permit authority seeks to justify a given exaction as an alternative to denying a proposed use, *Nollan* requires a reviewing court to scrutinize the instrumental efficacy



of the permit condition in order to determine whether it logically furthers the same regulatory goal as would outright denial of a development permit. A court must also, under the standard formulated in *Dolan*, determine whether the factual findings made by the permitting body support the condition as one that is more or less proportional, in both nature and scope, to the public impact of the proposed development." (*Ehrlich v. City of Culver City, supra*, 12 Cal.4th at p. 868.) The court further held that the same standard of review applies whether the authority conditions permit approval on the exaction of an interest in land or on the exaction of fee charged in lieu of the dedication of land. (Id. at p. 876.)

These cases do not alter the standard for reviewing the validity of a land use ordinance such as the HCO and do not alter the standard for reviewing a decision to deny a conditional use permit. They do no more than recognize that an exaction from a party deprives that party of something, be it a property right or a sum of money. They then provide a test for determining when such an exaction is a taking, holding that it is a taking unless it both furthers the same goals as would an outright denial of the permit and is roughly proportionate to the public impact of the proposed development.

Although Lambert contended in the trial court, and contends here, that the issuance of the conditional use permit was conditioned on his compliance with the one-for-one provisions of the HCO, this contention misstates the facts. The Planning Commission's decision to deny Lambert a conditional use permit was made not under the HCO, but under the authority, of the Planning Code. Under that Authority, the Planning Commission denied him a conditional use permit altogether. We recognize that Lambert's position is that the record contains evidence that San Francisco would have issued a conditional use permit if he paid $600,000. While it is somewhat disturbing that San Francisco's concerns about congestion, parking and preservation of a neighborhood might have been overcome by

payment of significant sum of money, the fact remains that San Francisco did not demand anything from Lambert as a condition of a use permit. It simply denied the permit outright. That the Planning Commission might have granted the permit upon payment of $600,000 does not make its refusal to issue the permit into a taking. Moreover, as Lambert concedes, in determining the validity of the administrative decision, we do not look into the subjective motivation of members of the Planning Commission. (See *City of Fairfield v. Superior Court* (1975) 14 Cal.3d 768, 776-779.) In short, as neither a property right nor money was in fact taken from Lambert, there is no reason to determine a taking would have occurred had Lambert been required to pay $600,000 as a condition of a use permit, and thus there is nothing requiring review under the *Nollan/Dolan/Ehrlich* standard.

The judgment is affirmed.

Stein, J.



I concur:

Dossee

Strankman, P.J., Dissenting

I dissent. I believe the record establishes that the City and County of San Francisco (City) sought money from Claude and Micheline Lambert as a condition to receiving the requested zoning permit and denied the permit when the Lamberts failed to pay the City's price. The majority acknowledges evidence that the City "might" have granted the permit if the Lamberts had paid the City $600,000, but discerns a distinction between denying a permit after the applicants fail to meet a condition and granting a permit upon a condition. (Maj. opn., pp. 7,11.) I see no meaningful distinction.

The City Conditioned Approval of the Zoning Permit Upon Payment of a Mitigation Fee.

The Lamberts' 58-room Cornell Hotel is regulated by the City's Residential Hotel Unit Conversion and Demolition Ordinance (HCO) which designated the hotel rooms as 31 residential units and 27 tourist units, based on the units' occupancy status in 1979.[1] (S.F. Admin. Code, §§ 41.1, 41.2, 41.4, subds. (a), (q), (s).) A hotel owner cannot convert one of his residential units into a tourist unit without a permit to convert. (S.F. Admin. Code, § 41.12.) No permit will be granted unless the hotel owner provides "one-for-one replacement of the units to be converted," such as by building comparable replacement units or paying to the City an amount equal to site acquisition costs and a percentage of the cost of building comparable replacement units. (S.F. Admin. Code,

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[1] The classification currently stands at 24 residential units and 34 tourist units, due to an administrative recalculation. (See Maj. Opn., pp.3-4).

§ 41.13, subds. (a)(1), (a)(4).) At the time relevant here, the "in-lieu fee" was 40 percent of the replacement cost plus site acquisition costs; today the replacement cost percentage has doubled to 80 percent. (S.F. Admin. Code, § 41.13, subd. (a)(4).) In 1990, the Lamberts applied under the HCO for a permit to convert their designated 31 residential rooms to tourist use. The City informed them that a conditional use permit was required to allow the change in use. A conditional use permit was required because an increase beyond the HCO-designated tourist hotel rooms constituted an enlargement of the Cornell Hotel's permitted conditional use. (S.F. Planning Code, § 178, subd. (c).) The Lamberts promptly applied for a conditional use zoning permit.

Meanwhile, "[i]n accordance" with the HCO, the City's Real Estate Department obtained two appraisals of the Cornell Hotel residential units' replacement cost.[2] (S.F. Admin. Code, § 41.13, subd. (a)(4).) The particulars of those appraisals were transmitted between City departments in 1992. Both appraisals were calculated under the HCO-prescribed formula, but the "range of value" between the two appraisals was conceded by the Real Estate Department to be "considerable:" $488,584 on the one end, and $612,887 on the other end. (S.F. Admin. Code, § 41.13, subd. (a)(4).) The Real Estate Department concluded that "the most appropriate estimate of the 40% replacement cost of existing residential rooms at the Cornell Hotel and the value of the required land on which to construct them is $600,000."

In early 1994, the City conducted several public hearings on the Lamberts' zoning permit application. At that time, the HCO had been declared unconstitutional by a federal district court and its enforcement permanently enjoined. (*Golden Gate Hotel v. San Francisco City & County* (N.D. Cal. 1993) 836 F.Supp.

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[2] The City's Real Estate Department reviews HCO permits to convert unless the public requests review by the City's Planning Commission.



707.) The injunction was in place from the district court's September 9, 1993, ruling until March 18, 1994, when the Ninth Circuit reversed it and remanded the case for consideration of the City's claim that the facial challenge under the takings clause was time barred. (*Golden Gate Hotel Ass'n v. San Francisco* (9th Cir. 1994) 18 F.3d 1482.) The City ultimately prevailed on that claim. (*Golden Gate Hotel Ass'n v. City & County of San Francisco* (N.D. Cal. 1994) 1994 WL 443666, aff'd (9th Cir. 1996) 76 F.3d 386, cert. den. (1996) __ U.S. __ [117 S.Ct. 51].) But the HCO was not enforceable in January 1994, when the Planning Commission held its first hearing on the Lamberts' zoning permit application. Nevertheless, the HCO formula was among the mitigation measures considered by the City Planning Commission in reviewing the Lamberts' permit application. The report from the City Planning Commission's January 1992 hearing states: "A number of options exist for the Commission to determine the appropriate level of mitigation of the loss of rental housing stock. The Commission has discretion to impose no conditions on the requested Conditional Use authorization or any condition reasonably related to the impacts of granting of this authorization." The report listed the HCO appraisals "[a]mong the possible mitigation measures," but also stated that other measures could be formulated.

The Lamberts' zoning permit application was denied on March 17, 1994. The City Planning Commission's ruling is based upon 26 express findings. Among those findings, are the following: "12. In accordance with [a provision of the HCO], the Department of Real Estate has obtained two independent appraisals of the in-lieu fee to be paid to the City and County of San Francisco to convert the thirty-one rooms of group housing (residential hotel units) to tourist hotel units .... Based upon the two valuations, the Department of Real Estate has determined the amount to construct comparable replacement residential hotel units to be $600,000. [¶] . . . [¶] 14. The Applicants made an offer for $100,000 to be paid in three

installments to compensate for the loss of group housing rooms from the City's housing stock if all 31 rooms of group housing were approved for conversion to tourist hotel use. [¶] . . . [¶] 20. In previous actions by this Commission, conversion of group housing rooms (residential hotel rooms) to tourist hotel use was approved for two nearby properties. Conversion of 15 rooms of group housing at The Juliana Hotel . . . was approved by the Commission on March 8, 1990 . . . . The conversion was approved upon the payment of $150,000 ($10,000 per group housing room) to the Residential Hotel Preservation Fund. Conversion of 10 rooms of group housing to tourist hotel rooms at . . . The Monticello Inn . . . was also approved by the Commission on March 8, 1990. . . . Conversion was also approved upon the payment of $150,000 ($15,000 per group housing room) to the Residential Hotel Preservation Fund. [¶] 21. The Commission finds that the requested authorization is not comparable to those previously granted in that the two other properties were predominantly tourist hotels. . . . The Commission also found in those cases that the housing loss had been mitigated through payment of a fee. [¶] 22. *The Applicants have failed to demonstrate that the amount offered for the construction or rehabilitation of 31 rooms of group housing is sufficient to mitigate the loss of housing stock by replacing the group housing rooms proposed for conversion.*" (Emphasis added.)

I think the record is clear that the City sought a mitigation fee from the Lamberts and denied the permit when they failed to offer a satisfactory amount. The City conducted appraisals that estimated the replacement value of the residential hotel rooms at $600,000. The Lamberts offered $100,000. The City had granted other zoning permits to hotel owners who paid $150,000 ($10,000 and $15,000 per room), but the Lamberts' offer amounted to only about $3,226 per room. The Lamberts "failed to demonstrate that the amount offered . . . is sufficient . . . ." I believe the City Planning Commission's express findings,



not its members' "subjective motivation," prove that the City would have granted the Lamberts' permit request had they succeeded in demonstrating that the amount offered was sufficient. (Maj. opn., p. 11.) In short, the City conditioned approval of the zoning permit upon payment of a "sufficient" mitigation fee, and denied the permit when payment was not made.

I recognize that the City Planning Commission's findings also included, as the majority rightly observes, a conclusion that the proposed conversion "would not provide a development that is necessary or desirable for, and compatible with, the neighborhood or the community . . . ." (Maj. opn., p. 7.) But that finding is rooted in the Planning Commission's determination that "[t]he City's housing stock must be preserved." Had the Lamberts paid a fee to mitigate the loss of housing stock, the permit would have been granted. The Planning Commission specifically noted that permits were granted to two other hotels when "housing loss had been mitigated through payment of a fee." If, as I believe, the City conditioned approval of the permit upon exaction of a discretionary mitigation fee, then an "essential nexus" must exist between the City's state interests and the exaction, and the exaction must be "roughly proportional" to the impact of the Lamberts' tourist use of their hotel. (*Dolan v. City of Tigard* (1994) 512 U.S. 374, 386, 391.) A regulatory agency's legitimate state interests and "laudable" land-use goals will not support unrelated permit exactions. (*id.* at p. 396.)

Discretionary Permit Exactions are Subject to Heightened Scrutiny.

It is beyond question that the City has broad powers to regulate land use. (*Nollan v. California Coastal Comm'n* (1987) 483 U.S. 825, 834-835.) But land-use regulations like the zoning law at issue here must "substantially advance legitimate state interests" and not deny a property owner

"economically viable use of his land," lest it constitute a taking. (*Agins v. Tiburon* (1980) 447 U.S. 255, 260.) The City is not free to attach conditions to its approval of a zoning permit which do not substantially advance legitimate state interests. Discretionary permit conditions that exact money or real property from landowners present "an inherent and heightened risk that local government will manipulate the police power to impose conditions unrelated to legitimate land use regulatory ends . . . ." (*Ehrlich v. City of Culver City* (1996)12 Cal.4th 854, 869 (plur. opn. of Arabian, J.), cert. den. (1996) __U.S. __ [117 S.Ct. 299].)[3] To assure that a discretionary permit exaction is related to legitimate regulatory ends, the government entity must demonstrate an "essential nexus" between the state interest and the permit condition, and a relationship of "rough proportionality" between the exaction and the impact of the proposed land use. (*Dolan v. City of Tigard*, *supra*, 512 U.S. at p. 391; *Nollan v. California Coastal Comm'n*, *supra*, 483 U.S. at p. 837; *Ehrlich v. City of Culver City, supra*, 12 Cal.4th at pp. 869-874.)

In *Nollan*, the United States Supreme Court invalidated a coastal development permit conditioned upon the landowners granting a public easement across their beachfront property. (*Nollan v. California Coastal Comm'n, supra*, 483 U.S. at pp. 827- 842.) The high court accepted the proposition that "a permit condition that serves the same legitimate police-power purpose as a refusal to issue the permit should not be found to be a taking if the refusal to issue the permit would not constitute a taking." (*Id.* at p. 836.) But a permit condition must serve the same purpose as a permit refusal. "[U]nless the permit condition serves the same governmental purpose as the development ban, the building restriction is not a valid regulation of land

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[3] Justice Werdegar joined in the plurality opinion's constitutional analysis without reservation, making it the holding of the Supreme Court. (*Ehrlich v. City of Culver City, supra*, 12 Cal.4th at p. 912 (conc. and dis. opn. of Werdegar, J.).)



use but an 'out-and-out plan of extortion.'" (*Id.* at p. 837.) An "essential nexus" must exist between legitimate state interests and the exacted condition. (*Ibid.*) The court found no such nexus between the state interest in preserving roadside ocean views and an easement allowing the public to walk across the landowners' property. (*Id.* at pp. 836, 838-842.)

In a more recent case, the United States Supreme Court found a nexus between state interests in flood prevention and traffic alleviation and a city's development permit conditions requiring a landowner to dedicate some of her commercial property for storm drainage and a pedestrian/bicycle pathway. (*Dolan v. City of Tigard, supra*, 512 U.S. at pp. 387-388.) But a nexus alone is not sufficient; there must also be a "'rough proportionality'" between the exaction and the impact of the proposed development. (*Id.* at p. 391.) In *Dolan*, the city failed to demonstrate that the demanded public floodplain easement was required for flood control, or that the demanded pathway was likely to offset traffic congestion created by the landowner's property development. (*Id.* at pp. 392-395.)

Our Supreme Court recently held that the *Nollan-Dolan* heightened standard of scrutiny applies to possessory and monetary discretionary exactions alike, and invalidated a zoning permit for construction of condominiums conditioned upon the landowner's payment of $280,000 to mitigate the loss of city land previously used for recreational facilities. (*Ehrlich v. City of Culver City, supra*, 12 Cal.4th at pp. 859-863, 881.) The exaction failed the "rough proportionality" test because the city made no "individualized findings to support the required 'fit' between the monetary exaction and the loss of a parcel zoned for commercial recreational use." (*Id.* at p. 883.)

Here, the City makes no real effort to satisfy the *Nollan-Dolan-Ehrlich* standard, and instead argues that the standard is inapplicable because the permit was denied, rather than granted with express conditions. We are thus presented with a critical

legal question: is heightened scrutiny triggered when a government entity denies a permit when a condition is not met, rather than granting the permit with a condition? The majority answer in the negative, confining *Nollan*, *Dolan* and *Ehrlich* to their facts. (*Nollan v. California Coastal Comm'n, supra*, 483 U.S. at p. 828 [permit granted with condition]; *Dolan v. City of Tigard, supra*, 512 U.S. at p. 379 [permit granted with conditions]; *Ehrlich v. City of Culver City, supra*, 12 Cal.4th at p. 862 [permit granted with condition].) I answer in the affirmative, extending *Nollan*, *Dolan* and *Ehrlich* to achieve their legal aim.

The standard of heightened scrutiny safeguards property owners needing development approval from a regulatory agency's improper leveraging of the state's police power. (*Nollan v. California Coastal Comm'n, supra*, 483 U.S. at p. 837 & fn. 5.) Discretionary permit exactions pose "an inherent and heightened risk that local government will manipulate the police power to impose conditions unrelated to legitimate land use regulatory ends . . . ." (*Ehrlich v. City of Culver City, supra*, 12 Cal.4th at p. 869.) Our Supreme Court has explained that the "standard of judicial scrutiny formulated by the high court in *Nollan* and *Dolan* is intended to address just such indicators [of leveraging] in land use 'bargains' between property owners and regulatory bodies -- those in which the local government conditions permit approval for a given use on the owner's surrender of benefits which *purportedly* offset the impact of the proposed development. It is in this paradigmatic permit context -- where the individual property owner-developer seeks to negotiate approval of a planned development -- that the combined Nollan and Dolan test quintessentially applies." (*Id.* at p. 868.) The threat of leveraging exists whether the regulatory agency grants a permit with a condition or denies a permit when a condition is not met. I do not believe the results in *Nollan*, *Dolan* and *Ehrlich* would have differed had the regulatory agencies demanded the exaction and then denied the permit



when the demand was refused. (See 1 Rathkopf, The Law of Zoning and Planning (4th ed. 1997) § 6.10, subd. (d), p. 6-110 [suggesting no change in *Nollan* result had the regulatory agency denied the permit but offered to approve the permit conditioned upon an exaction].) To believe otherwise is to believe a regulatory agency can evade the constitutional safeguard of heightened scrutiny by a shrewd repositioning of its exaction demands. We should be intolerant of such evasions. Compliance with the Fifth Amendment's Property Clause is "more than an exercise in cleverness and imagination." (*Nollan v. California Coastal Comm'n, supra*, 483 U.S. at p. 841.)

I would reverse the judgment for the City.

Strankman, P.J

Trial Court: Superior Court City and County of San Francisco

Trial Judge: Honorable William Cahill

Attorneys for Appellants: JAMES S. BURLING
R. S. RADFORD
VICTOR J. WOLSKI
Pacific Legal Foundation

Attorneys for Respondents:
LOUISE H. RENNE, City Attorney
ANDREW W. SCHWARTZ,
Deputy City Attorney

Appendix B-1

**Filed 7/28/99**

First Appellate District, Division One No. A076116

**S065446**

**IN THE SUPREME COURT OF CALIFORNIA**

---

CLAUDE LAMBERT et al., Appellants

v.

CITY AND COUNTY OF SAN FRANCISCO et al.,

Respondents

---

Pursuant to rule 29.4(c), California Rules of Court, the above-entitled review is DISMISSED and cause is remanded to the Court of Appeal, First Appellate District, Division One.

George

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*Chief Justice*
Mosk

_____

*Associate Justice*
Kennard

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*Associate Justice*
Baxter

_____

*Associate Justice*
Werdegar

_____

*Associate Justice*
Chin

_____

*Associate Justice*
Brown

_____

Associate Justice

Appendix C-1

**Filed 1/14/98**

First Appellate District, Division One No. A076116

**S065446**

**IN THE SUPREME COURT OF CALIFORNIA**

---

CLAUDE LAMBERT et al., Appellants

v.

CITY AND COUNTY OF SAN FRANCISCO et al.,

Respondents

---

Appellants' petition for review GRANTED.

George

_____

*Chief Justice*
Mosk

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*Associate Justice*
Kennard

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*Associate Justice*
Baxter

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*Associate Justice*
Werdegar

_____

*Associate Justice*
Chin

_____

*Associate Justice*
Brown

_____

Associate Justice

Appendix D-1

**Filed 9/11/96**

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE CITY AND COUNTY OF SAN FRANCISCO

| | |
|---|---|
| CLAUDE LAMBERT, an individual and MICHELINE LAMBERT, an individual<br><br>Plaintiffs and Petitioners,<br>v.<br>CITY AND COUNTY OF SAN FRANCISCO, a California Municipal Corporation, on behalf of the SAN FRANCISCO DEPARTMENT OF CITY PLANNING, SAN FRANCISCO CITY ZONING ADMINISTRATOR, and BOARD OF PERMIT APPEALS,<br><br>Defendants and Respondents. | No. 963368<br><br>JUDGMENT FOR CITY |

Based on the Court's Amended Order Granting Defendant's Motion for Summary Judgment filed on June 10, 1996, and Order Granting Motion for Reconsideration filed August 12, 1996, and good cause appearing, IT IS ORDERED, that defendant City and County of San Francisco shall be awarded judgment against plaintiffs Claude and Micheline Lambert.

DATED: 9/9/96

//s//WILLIAM CAHILL
WILLIAM CAHILL

Judge of the Superior Court

APPROVED AS TO FORM:

//s // R.S. RADFORD
R. S. RADFORD

Attorney for Plaintiffs,
Claude Lambert, et at.

Appendix E-1

**Filed 8/12/96**

CALIFORNIA SUPERIOR COURT

CITY AND COUNTY OF SAN FRANCISCO

DEPARTMENT NUMBER EIGHT

| | | |
|---|---|---|
| CLAUDE LAMBERT, et al., | ) | NO. 963368 |
| | ) | |
| Petitioners, | ) | ORDER GRANTING |
| | ) | MOTION FOR |
| vs. | ) | RECONSIDERATION |
| | ) | |
| CITY AND COUNTY OF SAN FRANCISCO, et al., | ) | |
| | ) | |
| Respondents. | ) | |

This matter came before this court on July 12, 1996. The Honorable William Cahill presiding, ordered this matter submitted. After consideration of all papers and arguments, this court orders as follows:

Plaintiffs' motion for reconsideration is GRANTED. However, this court's June 10, 1996 ruling, granting defendants' motion for summary judgment, remains the same under *Erlich v. City of Culver City* (1996) 12 Cal. 4th 854, a case cited and discussed in the parties' briefs in support of, and in opposition to, said motion.

DATED: August 12, 1996

//s//WILLIAM CAHILL
WILLIAM CAHILL
Judge of the Superior Court

Appendix F-1

**Filed 6/10/96**

CALIFORNIA SUPERIOR COURT

CITY AND COUNTY OF SAN FRANCISCO

DEPARTMENT NUMBER EIGHT

| | |
|---|---|
| CLAUDE LAMBERT, et al.,<br>Petitioners,<br><br>vs.<br><br>CITY AND COUNTY OF SAN FRANCISCO, et al.,<br><br>Respondents. | NO. 963368<br><br>AMENDED ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT |

This matter came before this court on May 17, 1995. The Honorable William Cahill, presiding, ordered this matter submitted. After full consideration of all papers and arguments, this court orders as follows:

IT IS HEREBY ORDERED that defendant City and County of San Francisco's motion for summary judgment is GRANTED. There remains no triable issue of fact that the Hotel Conversion Ordinance is not a "taking" and is constitutional under the California and United States Constitutions. *Loyola Marymount University v. Los Angeles Unified School District*, 96 C.D.O.S. 3831 (May 29, 1996). Additionally, because the Hotel Conversion Ordinance is constitutional, the Board of Permit Appeals can properly consider the Hotel Conversion Ordinance when determining whether to give the plaintiffs a conditional use permit.

This order is identical to the order issued on May 31, 1996 except that the case number has been corrected.

DATED: June 10, 1996

//s// WILLIAM CAHILL
Judge of the Superior Court

**As amended in Board 3/26/90**

FILE NO 113-89-2 ORDINANCE NO. 121-90

[Hotel Conversion Ordinance]

AMENDING THE SAN FRANCISCO ADMINISTRATIVE CODE BY REPEALING CHAPTER 41 THEREOF (RESIDENTIAL HOTEL UNIT CONVERSION AND DEMOLITION) AND ENACTING A NEW CHAPTER 41; AND AMENDING PART ii, CHAPTER 1 OF THE SAN FRANCISCO MUNICIPAL CODE (BUILDING CODE) BY AMENDING SECTION 333.2 THEREOF, TO AMEND THE HOTEL CONVERSION FEE SCHEDULE.

Be it ordained by the People of the City and County of San Francisco:

Section 1. Chapter 41 of the San Francisco Administrative Code ("Residential Hotel Unit Conversion and Demolition") is hereby repealed.

Section 2. The San Francisco Administrative Code is hereby amended by adding a new Chapter 41 ("Residential Hotel Unit Conversion and Demolition") thereto, reading as follows:

Chapter 41

Sec. 41.1 Title.

This Chapter shall be known as the Residential Hotel Unit Conversion and Demolition Ordinance.

Sec. 41.2 Purpose.

It is the purpose of this ordinance to benefit the general public by minimizing adverse impact on the housing supply and on displaced low income, elderly, and disabled persons resulting from the loss of residential hotel units through their conversion and demolition. This is to be accomplished by establishing the status of residential hotel units, by regulating the demolition and

conversion of residential hotel units to other uses, and by appropriate administrative and judicial remedies.

. . . .

Sec. 41.12 Permit to Convert.

(a) Any owner or operator, or his/her authorized agency, of a residential hotel may apply for a permit to convert one or more residential units by submitting an application and the required fee to the Central Permit Bureau.

(b) The permit application shall contain the following information:

(1) The name and address of the building in which the conversions are proposed; and

(2) The names and addresses of all owners or operators of said building; and

(3) a description of the proposed conversion including the nature of the conversion, the total number of units in the building, their current uses; and

(4) the room numbers and locations of the units to be converted; and

(5) Preliminary drawings showing the existing floor plans and proposed floor plans; and

(6) A description of the improvements or changes proposed to be constructed or installed and the tentative schedule for start of construction; and

(7) The current rental rates for each residential unit to be converted; and

(8) The length of tenancy of the permanent residents affected by the proposed conversion; and



(9) A statement regarding how one-for-one replacement of the units to be converted will be accomplished, including the proposed location of replacement housing if replacement is to be provided off-site; and

(10) A declaration under penalty of perjury from the owner or operator stating that he/she has complied with the provisions of Section 41.14(b) below and his/her filing of a permit to convert. On the same date of the filing of the application, a notice that an application to convert has been filed shall be posted until a decision is made on the application to convert.

(c) Upon receipt of a completed application to convert or demolish, the Bureau of Building Inspection shall send the application to the Department of City Planning for review and shall mail notice of such application to interested community organizations and such other persons or organizations who have previously requested such notice in writing. The notice shall identify the hotel requesting the permit, the nature of the permit, the proposal to fulfil the replacement requirements of Section 41.13 herein, and the procedures for requesting a public hearing. Owner or operator shall post a notice informing permanent residents of such information.

(d) Any interested party may submit a written request within 15 days of the date notice is posted pursuant to subsection (c) above to the City Planning Commission to schedule and conduct a public hearing on the proposed conversion in order to solicit public opinion on whether to approve or deny a permit to convert or demolish residential units and to determine whether proposed replacement units are "comparable units" as defined in Section 41.4(b) herein.

Sec. 41.13 One-for-One Replacement

(a) Prior to the issuance of a permit to convert, the owner or operator shall provide one-for-one replacement of the units to be converted by one of the following methods:

(1) Construct or cause to be constructed a comparable unit to be made available at comparable rent to replace each of the units to be converted; or

(2) Cause to be brought back into the housing market a comparable unit from any building which was not subject to the provisions of this Chapter; or

(3) Construct or cause to be constructed or rehabilitated apartment units for elderly, disabled or low-income persons or households which may be provided at a ratio of less than one-to-one; or construct or cause to be constructed transitional housing which may include emergency housing. The construction of any replacement housing under this subsection shall be evaluated by the City Planning Commission in accordance with the provisions of Section 303 of the City Planning Code. A notice of said City Planning Commission hearing shall be posted by the owner or operator ten (10) calendar days before the hearing; or

(4) Pay to the City and County of San Francisco an amount equal to Eighty Percent (80%) of the cost of construction of an equal number of comparable units plus site acquisition cost. All such payments shall go into a San Francisco Residential Hotel Preservation Fund Account. The Department of Real Estate shall determine this amount based upon two independent appraisals; or

(5) Contribute to a public entity or non-profit organization, who will use the funds to construct comparable units, an amount at least equal to eighty percent (80%) of the cost of construction of an equal number of comparable units plus site acquisition cost. The Department of Real Estate shall determine this amount based upon two independent appraisals. In addition to compliance with all relevant City ordinances regulations, the public entity or non-profit orgization and the housing development proposal of such public entity or non-profit organization shall be subject to approval by the Mayor's Office of Housing.



(A) Such contribution shall be paid to the approved public entity or non-profit organization in installments from an escrow account supervised by the Mayor's Office of Housing, upon application by such public entity or non-profit organization to the Mayor's Office of Housing. For specified expenditures, including but not limited to site acquisition costs, architect's fees, and construction costs; such payment shall be approved by the Mayor's Office of Housing prior to release of funds.

(B) The permit to convert shall be issued by the City when owner or operator deposits the full amount of funds in an escrow account described in subsection 41.11(a)(5)(A) above, or provides other form of non-refundable security acceptable to the City Attorney and the Mayor's Office of Housing.

(C) In the event that the public entity or non-profit organization is unable to complete construction of the replacement housing, any unpaid amounts shall be released to the City. All such funds shall go into a San Francisco Residential Hotel Preservation Fund Account.

(b) Any displaced permanent resident relocated to replacement units provided under subdivision (a) above shall be deemed to have continued his occupancy in the converted unit for the purpose of administering Subsection (k) of Section 37.2, San Francisco Administrative Code (San Francisco Rent Stabilization and Arbitration Ordinance).

(c) Any replacement units shall continue to be subject to the provisions of this Chapter.

(d) In the event that a completed application for a permit to convert is filed by a hotel owner or operator no later than the effective date of this amended Chapter, and such hotel owner or operator elects to provide one-for-one replacement of the residential units pursuant to Section 41.13(a)(4) or Section 41.13(a)(5) herein, the hotel owner or operator shall be obligated to pay to the City and County of San Francisco an

amount equal to forty percent (40%) of the cost of construction of an equal number of comparable units plus site acquisition cost, provided that such hotel owner or operator shall pay such amount to the City or provide to the City security for such payment in a form satisfactory to the Mayor's Office of Housing and the City Attorney within ninety (90) days following the date that the Bureau of Building Inspection determines that the application for a permit to convert is complete, or, if necessary, ten (10) days following final action, including any appeals, by the Planning Commission or appellate body, or ten (10) days following the Department of Real Estate's determination of such amount, whichever occurs latest. In the event that a hotel owner or operator elects to provide one-for-one replacement pursuant to Section 41.13(a)(2) or (a)(5) herein and the Mayor's Office of Housing has not approved a proposal or organization thereunder prior to the effective date of this amended Chapter, the Bureau of Building Inspection shall not reject such application as incomplete for such lack of information. If a hotel owner or operator applies for a permit to convert using the one-for-one replacement option described in 41.13(a)(2) or (a)(5) and the Mayor's Office of Housing does not approve a housing development proposal or a non-profit organization, or such project fails to progress through no fault of the owner or operator, such applicant shall be permitted to provide one-for-one replacement pursuant to Section 41.13(a)(4) at forty percent (40%) of the cost of construction of an equal number of comparable units plus site acquisition costs, provided that such applicant files the application under Section 41.13(a)(2) or (a)(5) no later than the effective date of this amended Chapter. The hotel owner or operator shall identify such housing proposal or non-profit organization within 180 days of the effective date of this amended Chapter. In the event that the Mayor's Office of Housing finds that the permit applicant has acted in good faith in seeking a project, the Mayor's Office of Housing may exercise its reasonable discretion to extend the provisions of this subsection for an



additional 180 days. In the event that a project approved by the Mayor's Office of Housing fails to move forward through no fault of the permit applicant, the applicant may substitute another project within six months of being notified by the Mayor's Office of Housing of a failure of the prior project to move forward. The Mayor's Office of Housing may extend this period for an additional 180 days to identify such new proposal. The City shall issue a permit to convert under this subsection 41.13(d) only if the hotel owner or operator has either paid the 40% in lieu fee to the City pursuant to Section 41.13(a)(4) herein or complied with the requirements of Sections 41.13(a)(2) or (a)(5) as applicable. In the event that a hotel owner or operator has not complied with any of these requirements and the City has not issued a permit to convert or if the Mayor's Office of Housing has not found the hotel owner or operator has acted in good faith in seeking a project pursuant to subsections 41.13(a)(2) or (a)(5) or this subsection, no later than one hundred eighty (180) days following the effective date of this amended Chapter, or such later date as herein provided, this Subsection 41.13(d) shall no longer be applicable, City shall refund any amounts deposited as security pursuant to the terms herein, and such hotel owner or operator shall comply with all applicable terms of this Chapter.

(e) When a residential unit is approved for conversion to another use pursuant to the provisions of Subsection 41.13(a)(2), (a)(4) or (a)(5) above, such unit shall not be deemed to be reconverted into a residential unit regardless of any interim uses after payment as set forth in Subsections 41.13(a)(2), (a)(4) or (a)(5).

Sec. 41.14 Mandatory Denial of Permit to Convert

A permit to convert shall be denied by Superintendent of the Bureau of Building Inspection if:

(a) The requirements of Sections 41.12 or 41.13, above, have not been fully complied with;

(b) The application is incomplete or contains incorrect information;

(c) An applicant has committed unlawful action as defined in this Chapter within (12) months previous to the issuance for a permit to convert:

(d) The proposed conversion or the use to which the unit would be converted is not permitted by the City Planning Code.

Sec. 41.15 Approval and Issuance of Permit to Convert

The Superintendent of the Bureau of Building Inspection shall issue a permit to convert, provided that:

(a) The requirements of Section 41.12 have been met;

(b) Evidence of compliance with the requirements of Section 41.13 has been submitted. Satisfactory evidence of compliance may be:

(1) A certification of final completion or permit of occupancy on the replacement housing; or

(2) A receipt from the City Treasurer that the in-lieu payment determined by the Department of Real Estate has been received; and

(3) Evidence of compliance with the requirements of Section 41.17 herein.

(c) The proposed conversion or the use to which the unit would be converted is permitted by the City Planning Code.

(d) Concurrent with the issuance of a permit to convert, the Superintendent of the Bureau of Building Inspection shall issue a new certificate of use which shall state the newly certified number of residential units and tourist units.